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HOWE *v.* OHMART. 7 Ind. App. 32; 33 N. E. 466. INDIANA APPELLATE COURT. FEBRUARY 28th and JUNE 12, 1893.

REINHARD, C. J.—This was an action to recover damages for injures inflicted upon the plaintiff below by falling through an opening in the floor of the defendant's school building, where he had gone under the following circumstances: The plaintiff had been a former student at the school, and upon the evening in question had returned at the invitation of certain of the students to attend the meeting of a literary society, of which they were members. The meeting was held, and the invitation to plaintiff (with those to others) was sent out with the approval of the college authorities, who furnished light and heat for the occasion. The plaintiff left the meeting-room, alone, upon a necessary purpose, and turning into a hallway fell into an opening in the floor, which had been only partially protected, and received the injury for which he complained.

The defence, beside that of contributory negligence was upon the ground that the plaintiff was merely a trespasser or at most a licensee, to whom no duty of care was owed, and to whom they were consequently not liable. Upon the above suggested evidence the court held that "the jury were justified in drawing the inference that the appellee was neither a trespasser nor a mere licensee, but was there upon at least the implied invitation of the college authorities." . . . "and that the appellants owed him the duty to protect him from dan-

gerous pitfalls or other obstructions when he was in the building.

Verdict for the plaintiff affirmed, and a rehearing was subsequently denied.

THE DISTINCTION BETWEEN THE LIABILITY OF A PROPERTY OWNER FOR INJURIES TO GUESTS AND TO INVITED PERSONS.

That the insufficiency of language has been the cause of much uncertainty in the law, as well as in other branches of learning, is demonstrated by a consideration of the principles involved in this case. It has been unquestioned law for many years that the owner or occupier of real estate owes certain duties to those who come thereon, according to the cause of their entry, and the nature of the danger to which they are exposed. To trespassers it is only against active injury, to licensees it is to give notice of hidden dangers or traps, while to invited persons (as that term is understood by the law), the owner is bound to use reasonable care, having respect to the person and character of the business to be carried on to save his guest from injury while upon the premises. But the difficulty which is instantly met in this class of cases, is to distinguish between licensees and invited persons. In other words to ascertain the exact scope of the word "invitation" as legally used. The language cited with approval in the principal case from *Evansville, &c., R. R.* v. *Griffin*, 100 Ind. 221, is characteristic of that found in many. "If the owner or occupant of lands, by any enticement, allurement or inducement, causes others to come upon or over his lands, then he assumes the obligation to persons so coming to provide a reasonably safe and suitable way for the purpose." The latitude in these words, however, is so great as to render them of very little practical value, for they can easily be stretched to cover a great many cases which no court would include within the invitation class. Indeed, the earliest case in which the property owners' liability to guests was considered, is against a liberal construction. In *Southcote* v. *Stanley*, 1 H. & N. 247 (1856), the plaintiff was the guest of the proprietors of a hotel, and was injured by the breaking of a glass door, which

was in an unsafe condition. The court refused a recovery, POLLOCK, C. B., upon the ground that a social visitor must be considered as a member of the family into which he comes, and consequently entitled to no greater care. "Whilst he remains there," said the Chief Baron, "he is in the same position as any other member of the establishment so far as regards the negligence of the master or his servants." And Baron BRAMWELL, upon the ground that he was a licensee only, and entitled to no special care, saying, "If a person ask a visitor to sleep in his house and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply of omission." The extreme position of Baron POLLOCK has never been accepted and cannot be maintained: *Pollock on Torts*, *427; *Clerk* v. *Lindsell on Torts*, 59.

And while the general thought of Baron BRAMWELL is less open to attack, the illustration is not good, for if a person ask another to sleep in his bed, he is bound in common prudence (which is the test of all these relative duties) to see that the bed is as safe as such places usually are, and a simple warning of a possible danger will not, it is submitted, be sufficient.

This decision has been sufficient, however, to justify a number of writers in saying, that the test of "Invitation" is direct or indirect pecuniary gain, and that a guest in the ordinary acceptation of the word is not an invited person at all, but simply a licensee.

Thus Campbell (on Negligence), says: "Invitation is inferred where there is a common interest or mutual advantage, while a licensee is inferred where the object is the mere pleasure or benefit of the person using it." And again, "Invitation therefore, in the technical sense of the word, differs from invitation in the ordinary sense—implying the relation of host and guest. In the case of host and guest it would be thought hard that the hospitality of the former should expose him to the responsibilities implied by the business relation. The guest must take the premises as he finds them, with any risk of their disrepair; although the host is bound to warn his guest of any concealed danger upon the premises known to himself."

Mr. Pollock says (Torts, *427): "A guest (that is a visitor who does not pay for his entertainment) has not the benefit of the legal doctrine of invitation in the sense now before us. He is in point of law nothing but a licensee."

And Wharton says (Negligence, § 350): "A man does not undertake to make his house safe so far as concerns mere visitors."

In the late case of *Plummer* v. *Dill*, 156 Mass. 426, the court said: "It is well settled that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant."

Such a doctrine as this has the undoubted effect of simplifying the question, and a great many cases are easily and rightly disposed of by it. In *Benson* v. *The Baltimore Traction Co.*, 26 Atlantic Rep. 937 (1893), the plaintiff was one of a class of boys who was given permission by the president of the defendant company to visit their power house and view the machinery. While walking about he fell into an open pit of hot water, which was allowed to remain unfenced, and was seriously scalded. A recovery was denied, upon the ground that there was no possible mutuality of interest in the visit, as it was only for the instruction of the boys, and the simple permission could not be construed as an invitation. In this case the mutuality rule is applied with great force and the result is very satisfactory. In the following cases decisions were reached which are entirely conformable to the rule:

In *The Oil Co.* v. *Norton*, 70 Tex. 400; S. C., 7 S. W. 756, a person was permitted to enter the defendant's works to speak to an employé and was injured while there.

In *Woolwine's Ad.* v. *C. & C. R. R.*, 15 S. E. 81 (W. Va.), 1892, the plaintiff went on defendant's land to speak to a telegraph operator employed there and was injured.

In *Lachat* v. *Lutz*, 22 S. W. 218 (Ky.), 1893 the plaintiff

entered defendant's premises to deliver a message from an employé and was injured while there.

In *Steeger* v. *Van Seclin*, 132 N. Y. 499, a woman was injured by the fall of a stairway in an old building, where she had gone to seek her children, who where accustomed to play there.

In *Laramore* v. *The Crown Point Iron Co.*, 101 N. Y. 391 (1886), the plaintiff went to the defendant's mine to seek employment, and was injured by some of the machinery there operated.

In *Walker* v. *Winstantly*, 155 Mass. 301 (1891), the plaintiff went into defendant's house to seek kindling wood and fell down a flight of steps. See, also, *Gillis* v. *Penna. R. R.*, 59 Pa. 129 (1868); *Redegan* v. *B. & M. R. R.*, 155 Mass. 44 (1891); *Metcalf* v. *Steamship Co.*, 147 Mass. 67 (1888); *Parker* v. *Portland Pub. Co.*, 69 Me. 173; *Sullivan* v. *Waters*, 14 Ir. C. L. 460 (1864).

In none of these cases was a recovery allowed, and in none was there such a mutuality of interest as to bring them within the rule. To this extent then the rule appears true. But it must also be recollected that they are all typical license cases, and without a forced construction there was no "inducement or allurement" held out. Nor was there any express invitation to enter the premises where the accident happened. The nearest was a license solicited and granted. It cannot be said, therefore, that the mutuality rule gathers any material strength from them as against the ordinarily understood distinction between license and invitation.

On the other hand the rule includes all those cases which are universally admitted to fall within the "invitation" class, such as where one who enters the store of another to buy goods and is injured while there: *Clapp* v. *Mear*, 134 Pa. 203 (1890); *Gordon* v. *Cummings*, 152 Mass. 513 (1890); *Freed* v. *Cameron*, 4 Rich. L. 228 (1851); and where the defendant's excursion wharf was so defective that the plaintiff, who was lawfully thereon, fell and was injured: *O'Callaghan* v. *Bode*, 84 Cal. 489 (1890); *Campbell* v. *Portland Sugar Refining et al.*, 62 Me. 552 (1873).

In these cases, there was a clear mutuality of interest or direct or indirect expectation of pecuniary profit resulting from the visit. A storekeeper is considered as constantly holding out an invitation to all persons, desiring to do business with him to enter for that purpose, and, if this invitation is accepted, the responsibilities of invitation attach to the host: *Clapp* v. *Mear, supra.*

With this understanding of the mutuality rule, the principal case becomes of great interest, as the decision of the court would bring it within the invitation class, and, consequently, the interest of the defendant in the visit of the plaintiff must be found. But did the college derive any benefit from the visit of the plaintiff? He came simply as a visitor to the meeting of the literary society, and the only part played by the college itself was in permitting the invitation to be sent to the plaintiff and allowing their building to be used for the meeting. By a forced construction of the facts of the case it might be argued that the invitation was to be considered as an advertising scheme, which, eventually, might result in some benefit to the defendants, and thus the requirements of the rule be satisfied.

But such was not the position of the court, nor was the mutuality rule mentioned, but having invited the plaintiff upon the premises, and, consequently, in any sense of the word, "induced" or "allured" him to enter, they "owed him the duty of protection from dangerous pit falls or other obstructions while in the building," and this is nothing more nor less than admitting the plaintiff to the class of invited persons without the existence of any mutuality of interest in the visit.

The case of *Davis* v. *The Central Congregation Society*, 129 Mass. 167 (1880), was somewhat similar and equally irreconcilable with the mutuality rule as laid down by the text writers already quoted. The plaintiff was injured by reason of the dangerous condition of a way leading to the defendant's church, where she had gone upon an invitation sent to another congregation of which she was a member. A recovery was allowed, and no attempt was made to discover any mutual or pecuniary interest in the visit. The court said: "The fact that

the plaintiff was induced by the defendant to enter upon a dangerous place, without warning, is the negligence which entitles the plaintiff to recover." The only possible ground upon which a mutuality of interest could be assumed in this case would be, that the church was intended for just the purpose for which the plaintiff attempted to enter it. But wherein would the case then differ from a private drawing room to which a guest has been especially invited, or the hotel where the guest suffered his injury in: *Southcote* v. *Stanley*, *supra*.

These cases are not only opposed to the rule as laid down in the text books, but they show a fatal weakness in it, as in both cases the rule would have barred a recovery, and in both the decision of the court appears to everyone as fair and necessary under the circumstances.

The solution of the difficulty probably lies in the division of the subject into express and implied invitation, and limiting the mutuality rule to the latter class only. Such a destruction is hinted at by Bigelow (Torts, 326), where he says: "In regard to this class, it is to be observed that if there be *no actual invitation* to the injured person to go upon the premises in question, in order to recover damages for the injuries sustained, he must have gone upon the premises for business with the occupier," and see the same thought, in *Cooley on Torts*, 604-7; *Plummer* v. *Dill*, 156 Mass. 426 (1892).

Likewise, the cases just noticed are in harmony with such a theory, for in both the injured party was expressly invited into danger, and, consequently, within the class of express invitation cases. And the reason of such a solution of the problem cannot but be apparent. The contractual element, which Wharton assumes in the duty owed by a property owner to one who enters thereon upon business, although convenient, is not, it is submitted, a proper basis for a settlement of his rights. Every one owes to every one else a certain degree of care with respect both to his own actions and to any property which he may possess, and that care is in proportion to the extent to which such person has put himself under his protection of the other, and in proportion to the

care which it is possible to exercise, considering the circumstances of the particular case. The trespasser is entitled to nothing, because he is a trespasser of whose presence the owner of the premises is unaware. The licensee tacitly assumes the risk of any ordinary danger, and, consequently, beyond notice of hidden pitfalls or traps, the owner is relieved of responsibility. But an invited person is acting, as it were, under the direct command or direction of his host, and because of this confidence reposed in the host an action will lie if injury follows. It is a result springing directly from the relation of the parties, and this relation, it is submitted, can as well be raised by an express invitation to a social guest as to a business caller. "The fact that the plaintiff was induced to enter into a dangerous place without warning is the negligence, which entitles the plaintiff to recover."

The position and rights of a social visitor without "express" invitation is a new and very interesting one for a discussion of which is cited *Plummer* v. *Dill*, 156 Mass. 426 (1892).

"C. C."

Philadelphia, March 12, 1895.